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RE CHAI MIN SIN, EX P MBF FINANCE BHD

HIGH COURT SABAH & SARAWAK, MIRI
ABDUL AZIZ ABDUL RAHIM JC
b [BANKRUPTCY PROCEEDINGS NO: 29-200-2001 (MR)]
25 AUGUST 2003

BANKRUPTCY: *Practice and procedure - Stay of proceedings - Application for - Exercise of court's discretion - Whether there were special circumstances - Whether there were sufficient grounds to grant a stay*

c This was an appeal ('the 1st appeal') by the judgment debtor against the decision of the learned deputy registrar dismissing the judgment debtor's application for a stay of all bankruptcy proceedings pending the disposal of an appeal ('the 2nd appeal') to the Court of Appeal by the judgment debtor. The 2nd appeal was against the decision of the learned judicial commissioner d dismissing the judgment debtor's appeal to set aside a sessions court decision allowing judgment in default of appearance against the judgment debtor in favour of the judgment creditor. The sessions court judgment was the basis of the bankruptcy proceedings taken against the judgment debtor by the judgment creditor. The judgment debtor submitted that the bankruptcy proceedings ought e to be stayed until the outcome of the 2nd appeal was known and that this court ought to grant the stay as the 2nd appeal was a *bone fide* appeal. The judgment creditor, however, contended that the court had a discretion whether or not to grant a stay and the judgment debtor could not claim a stay as of right.

f **Held:**

[1] The commencement of a bankruptcy proceeding against a party who had been ordered to pay a judgment sum was a form of execution, and for there to be sufficient grounds for a stay, special circumstances must be shown. In this case, the judgment debtor's affidavit in support of the g application for stay did not disclose any ground that gave rise to special circumstances. The judgment debtor did not provide facts or evidence to show how he would suffer irreparable damage or be prejudiced. Hence, it was impossible for the court to form a reasonable opinion as to whether the grounds raised to get the order for stay were sufficient or not. Mere h allegations were not enough and the fact that there was an appeal pending was also not a sufficient ground to grant a stay. (pp 276 h & 277 d-g)

[Appeal dismissed.]

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Case(s) referred to:

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(foll)***

Minister of Labour, Malaysia v. Chan Meng Yuen & Another Appeal [1992] 2 MLJ 337 SC ***(refd)***

Re a debtor (No 44 of 1978), ex p the Debtor v. Chantry Mount and Hawthorns Ltd [1979] 3 All ER 265 ***(refd)***

Re Chor Saw Onn, ex p Tan Jiak Chye [1999] 7 CLJ 119 HC ***(refd)***

Re Khoo Kay, ex p Tan Jiak Chye [1999] 6 CLJ 637 HC ***(refd)***

Re Noble (a bankrupt), ex p The Bankrupt v. The Official Receiver and Anor [1964] 2 All ER 522 ***(refd)***

Re Tan Ah Poi, ex p Multi Purpose Finance Bhd [1999] 2 CLJ 694 HC ***(refd)***

Re Walter Su, ex p United Malayan Banking Corp Bhd [1987] 1 MLJ 44 ***(refd)***

See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 6(4), 97

Bankruptcy Rules 1969, r. 137

Bankruptcy Rules 1952 [UK], r. 179

Other source(s) referred to:

Halsbury's Laws of England, 3rd edn, vol 2, pp 310-311

For the judgment debtor - Tai Choi Yu; M/s Tai Choi Yu & Co
For the judgment creditor - Louis Achuk; M/s Kadir Wong Lin & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Aziz Abdul Rahim JC:

This is an appeal by judgment debtor against the decision of the learned deputy registrar dismissing with costs the judgment debtor's summons-in-chambers (encl. 18) application for stay of all bankruptcy proceedings before the High Court pending the disposal of the appeal to the Court of Appeal by the judgment debtor against the decision of the learned Judicial Commissioner Dato' Sulaiman bin Daud (as he then was) dated 4 October 1997 dismissing the judgment debtor appeal to set aside a Session Court decision in Summons No 52-312-97 (allowing judgment in default of appearance against the judgment debtor in favour of the judgment creditor). The judgment of the Sessions Court is the basis of the bankruptcy proceedings taken against the judgment debtor by the judgment creditor.

As to the power of the court to grant a stay, reference is made to s. 6(4) and s. 97 of the Bankruptcy Act 1967 (Act 360) Rev. 1988) which are reproduced below:

S. 6(4) When the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure or compound for a judgment debt, the Court may if it thinks fit stay or dismiss the petition on the ground that an appeal is pending from the judgment.

and

S. 97 Power to stay proceedings:

The Court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to conditions as the court thinks just.

In this appeal, the counsel for judgment creditor, Mr. Louis Achuk, submitted a written submission. But the counsel for the judgment debtor, Mr. Tai Choi Yu, did not. In any case the counsel for the judgment debtor/appellant submitted that he had only one ground to raise in the appeal that is the judgment debtor's appeal against the Judicial Commissioner Dato' Sulaiman bin Daud (as he then was) is still pending before the Court of Appeal and therefore the bankruptcy proceedings before this court ought to be stayed until the outcome of the appeal is known. On the same point, counsel for the judgment debtor/appellant further submitted that the court ought to grant the stay because the appeal before the Court of Appeal was a *bona fide* appeal. To support his argument, the counsel for the judgment debtor/appellant, Mr. Tai, cited a passage at para 590 of *Halsbury's Laws of England* 3rd edn vol. 2 at pp. 310-311 which states the English position as to principles applicable for stay of bankruptcy proceedings in England. Mr. Tai also referred to two English cases. The first case is *Re a debtor (No. 44 of 1978), ex parte the Debtor v. Chantry Mount and Hawthorns Ltd* [1979] 3 All ER 265 which held that r. 179 of the English Bankruptcy Rules 1952 does not in itself prevent a receiving order being made where an appeal was pending, although normally the court would stand over the application to make the receiving order where there was a *bona fide* appeal against refusal to set aside a bankruptcy notice which was being pursued with diligence.

Rule 179 of the English Bankruptcy Rules 1952 is in *pari materia* with our r. 137 of the Bankruptcy Rules 1969 and it states as follows:

A receiving order shall not be made against a debtor on a petition in which the act of bankruptcy alleged is non-compliance with a bankruptcy notice within the appointed time where such debtor has applied to set aside such notice until after the hearing of the application or where the notice has been set aside or during a stay of the proceedings thereon; but in such case the petition shall be adjourned or dismissed as the court thinks fit.

In my view the above rule does not prevent a court from making a receiving order where there is an appeal pending. My understanding of the said rule is that if the debtor has applied to set aside the bankruptcy notice within the period specified in the notice for the debtor to satisfy the judgment sum or where a stay of proceedings had been granted, then a receiving order should not be made against the debtor. In my view the above rule does not change the settled law that the granting or non granting of a stay of a bankruptcy proceedings pursuant to s. 6(4) and s. 97 of the Act is the discretion of the court. The judgment debtor cannot claim a stay as a matter of right. This is also the position in England. This can be seen from the footnote at p. 310 to the passage in *Halsbury's* cited by Mr. Tai above. In fact the note goes further, by referring to an English case of *Re French, Ex parte French*, to comment that if the registrar in the exercise of his discretion, refuses a stay, his decision will not be interfered with on appeal, unless the discretion was wrongly exercised.

The second case cited by Mr. Tai for the debtor/appellant is *Re Noble (a bankrupt), Ex parte The Bankrupt v. The Official Receiver and Anor* [1964] 2 All ER 522 which also applied the same principle that the receiving order ought not to be made if the registrar was satisfied the appeal was *bona fide.* But in that case the receiving order was set aside because the court found that the basis for the bankruptcy proceedings did not exist. For that reason the appeal was said to be *bona fide* although in that case the court eventually dismissed the appeal on other grounds.

On the part of the judgment creditor's learned counsel, Mr. Louise Achuk submitted that the court has a discretion whether or not to grant a stay and that the judgment debtor cannot claim a stay as of right. He cited the case of *Re Walter Su, Ex parte United Malayan Banking Corp. Bhd* [1987] 1 MLJ 44. In that case also, Mohammed Dzaiddin J (as he then was) held that the mere fact that an appeal is pending over the judgment is not sufficient ground for staying the proceedings upon petition. The learned judge also held that the court will not enquire into the validity of a judgment debt unless there is evidence that the judgment had been obtained by fraud or collusion, or that there has been some miscarriage of justice. The same principle was followed in later cases that come after *Re Walter Su* (see *Re Khoo Kay Ex-parte Tan Jiak Chye* [1999] 6 CLJ 637; *Re Tan Ah Poi, Ex p Multi Purpose Finance Bhd* [1999] 2 CLJ 694; *Re Chor Saw Onn, Ex p Tan Jiak Chye* [1999] 7 CLJ 119 and the Court of Appeal decision in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 AMR 2867).

So what are sufficient grounds which the court may consider in exercising its discretion to grant a stay order. In the first place I do not think that it is wise or possible to list all the possible grounds that can be considered sufficient to grant a stay. I think each case has to be decided on its own facts guided by the established principles which have been settled by the authorities. As a guide I may quote from the passage in *Ming Ann Holdings*' case above where Justice Abdul Hamid Mohamad JCA at p. 2868 says:

> On the authorities, it would appear that it is a unanimous view that whether or not a stay of execution pending appeal should be granted, it an exercise of discretion by the court based on established principles. It further appears from the weight of authorities that special circumstances must be special, not ordinary, common or usual circumstances that goes to the execution of the judgment and not to the validity or correctness of the judgment or merits of the appeal. It is a common view that merits of appeal (or correctness or validity of the judgment) does not amount to special circumstances.

From the above passage it can be culled that for a ground to be considered sufficient, it must also show special circumstances. For example the grounds must convince the court that if the stay order is not given the execution of the judgment will result in gross injustice to the party against whom the judgment was made. It is not sufficient to say that there is merit in the appeal or the appeal would likely be successful.

The grounds which are considered sufficient and showed special circumstances must be apparent from the affidavit in support of the application for stay, (see the Supreme Court case of *Minister of Labour, Malaysia v. Chan Meng Yuen and Another Appeal* [1992] 2 MLJ 337).

Mr. Tai for the judgment debtor/appellant submitted that the principle of special circumstances, as elaborated in *Ming Ann*'s case is applicable only to stay of execution. But for stay of bankruptcy proceedings the principle applicable is *bona fide* appeal. It is true that *Ming Ann*'s case was concerned with the stay of execution. So was the case of *Seow Teow Guan* [1997] 2 CLJ 299, a Court of Appeal decision which was considered in *Ming Ann*'s case. The question is should there be any different in principles applicable between a stay of execution and a stay of a bankruptcy proceedings? Both have the effect of depriving the successful party the fruits of the litigation, albeit temporarily. To me it makes no difference. In my view a stay is a stay regardless whether it is in respect of execution or a bankruptcy. In fact I would go a step further and suggest that the commencement of a bankruptcy proceeding against a party who has been ordered to pay a judgment sum is a form of execution. Therefore the principles applicable should be the same.

Thus, in my view the ground of *bona fide* appeal may be classified as one of the categories of special circumstances that may be considered by the court in order to grant or not to grant a stay in the same manner as the Court of Appeal said in *Ming Ann*'s case as regard the ground that the appeal will become nugatory if a stay is not allowed. In that case the Court of Appeal said there is no new ground such as nugatory; it is one of the grounds that need to be considered under the heading of special circumstances. In my view the ground of *bona fide* appeal, to qualify as special circumstance, must reach the level of *Re Noble* where the court found as a matter of fact that the basis of the bankruptcy proceeding is non-existent.

In this case, before me, the judgment debtor/appellant affidavit of Chai Min Sin affirmed on 1 July 2002 in support of judgment debtor's application for stay did not disclose any ground that can be considered sufficient or gives rise to special circumstances. The affidavit averred only to the fact that the judgment debtor is appealing against the High Court Order dismissing judgment debtor's appeal to set aside the judgment of the Sessions Court and that the appeal is pending. In addition, the judgment debtor also averred in the said affidavit that if the stay is not granted it will render his appeal to the court of appeal, if successful, nugatory and he will suffer irreparable damage and prejudice. However the judgment debtor did not provide the facts or the evidence in the said affidavit to show in what way he would suffer irreparable damage or that he would be prejudiced. In the absence of such evidence or facts it will be impossible for the court to form a reasonable opinion as to whether the grounds raised to get the order for stay are sufficient or not. Mere allegations without sufficient facts or evidence to support such allegations are not enough.

Furthermore, in this case the appeal to the Court of Appeal is against the decision of the learned Judicial Commissioner in dismissing the appeal by the judgment debtor to set aside the default judgment entered by the sessions court in favour of the judgment creditor/respondent. One would therefore give sufficient credit to the trial judge that he had considered all aspects of the appeal before he decided to dismiss it. In that circumstance, one cannot assume that the decision of the learned judge is wrong. In any case, the fact that there is an appeal pending is not sufficient ground to grant a stay. Therefore to go further on this point would mean going into the merits of the appeal which this court should refrain from so doing.

In the circumstances, I dismiss the appeal with costs.